No. 83

IN THE

# Supreme Court of the United States

October Term, 1941

MERION CRICKET CLUB,
*Petitioner,*

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

## BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The opinion of the District Court (R. 51) is not reported. The opinions of the Circuit Court of Appeals (R. 54) are reported in 119 F.(2d) 578.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 28, 1941 (R. 61). The petition for a writ of certiorari was filed on May 12, 1941, and was granted on October 13, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Ch. 229, 43 Stat. 936).

## STATEMENT OF THE CASE

This is an action by the Merion Cricket Club against the United States to recover $18,690.29 which the club collected from its members and paid to the collector, as the 10 per cent. Federal dues tax, on golf fees for the years 1931 to 1935.

The tax was collected under the Revenue Act of 1928 (Sec. 413 of the Act approved May 29, 1928, Ch. 852, 45 Stat. 864; 26 U. S. C. A., 1940 Ed., §1710; Internal Revenue Code §1710, 53 Stat. Part 1, 192), which imposes:

> "A tax equivalent to 10 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club."

The section is given in full in Appendix, p. 34.

The case was tried before Judge Kalodner and resulted in a judgment for the defendant entered on January 26, 1940. Judge Kalodner's opinion (R. 51) adopted without discussion that of Judge Kirkpatrick in *Hardt v. McLaughlin*, 25 F. Supp. 684, a suit brought by a member of the Merion Cricket Club involving the same questions of law and fact, but from which no appeal was taken. The *Hardt* opinion appears in the record (R. 45).

By agreement of the parties approved by the trial judge, no evidence of damages was given with the understanding that if judgment was entered for plaintiff in the District Court, or on appeal, the plaintiff would be given an opportunity to prove the damages.

The by-laws of the Merion Cricket Club provided for ten classes of membership with the qualifications, the privileges and the dues of each class (R. 10 to 14).

The by-laws provide (R. 12-13) that Playing Members (who have all the privileges of the club except the right to use the two club houses) may transfer to the Senior or the Family Class, and that Senior Members (who have the same rights as Playing Members plus the use of the two club houses) may transfer to the Family Class (who have in addition, the right to cards for the ladies of their household). But neither Family nor Senior Members are permitted to move down to a lower class with lower dues.

Members of all the classes, except Playing Members (none of whom were allowed to play golf) (R. 15), were given the privilege of playing golf for an annual fee, payable in semi-annual instalments. The fees varied from $30 for members under 21, to $110 for male members over 21, and they did not depend on the class of membership to which the member belonged (R. 17).

The club had two club houses, one known as the main club house and the other as the golf house. All members who could use the main club could also use the golf house without regard to whether or not they had paid the fee for the privilege of using the golf course (R. 12).

The golf privilege could be terminated by notice before the end of the year, and if such notice was not given the member was liable for another year's fee (R. 15).

The club made fixed charges for the use of various other similar privileges and facilities for substantial periods of time, and the government has never demanded the dues tax on such fees (R. 35, 36).

There was no confusion in the by-laws between the dues and the golf fees, or between the privileges which the members of the various classes of membership obtained by the payment of the dues and the golf privileges obtained by the payment of the golf fees. The by-laws are analyzed in detail in the Appendix.

The plan of membership set-up has been the same since 1892, and the method of charging for golf has been the same since 1896—21 years before the Federal dues tax was first imposed in 1917 (R. 34, 31 and 32).

Treasury Regulations 43 (Part 2), revised September 1924, Article 9 (pp. 10, 11) (Appendix p. 36) contained the following:

> "So, also [subject to the tax] are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

and among the examples:

> "(7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured by the member's family. A payment of this extra $10 is taxable as a membership fee."

These Regulations were in effect when the case of *Weld v. Nichols*, 9 F.(2d) 977 (Mass.), was decided on December 30, 1925. This was the first case on the meaning of "club

dues" and it decided, directly contrary to the Regulations, that a semi-annual fee for the privilege of playing golf was not club dues. The government withdrew its bill of exceptions on March 23, 1926 (R. 29). The Government made a refund to the club and no demand for the payment of the tax has since been made (R. 28).

Shortly after the withdrawal of the Bill of Exceptions a new revision of the regulations was made — Treasury Regulations 43, Part 2, May 21, 1926, which deleted the two portions of Article 9 quoted above (Appendix p. 36). The two deleted portions have not appeared in the Treasury Regulations since then.

After the *Weld* decision, the Bureau of Internal Revenue allowed claims for refund where the facts were within that decision (R. 20-21).

Among these claims, the Government paid the Merion Cricket Club $23,728.32 on March 13, 1928, on a claim allowed because it "represents taxes on extra charges collected from members for the privilege of using the golf course" (R. 33). From the dates of the payment of the golf fees so refunded to the dates of the payment of the golf fees involved in the case at bar, there was no substantial change in the by-laws (R. 19).

On May 29, 1928, the Revenue Act of 1928, involved in the case at bar, was approved.

From the judgment for defendant, the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit which affirmed the judgment on March 28, 1941, two opinions and a dissenting opinion being filed (R. 54).

The writ of certiorari was filed on May 12, 1941, and was granted on October 13, 1941.

## SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that golf fees of the Merion Cricket Club were "dues or membership fees" under the Revenue Act of 1928.

2. In affirming the judgment of the District Court for the defendant.

3. In not entering judgment for the plaintiff.

## SUMMARY OF ARGUMENT

"Dues or membership fees" do not include annual fees paid by a member to a club for the privilege of playing golf, optional with the members and terminable at the end of the year.

The words must be strictly construed as this is an excise tax with nothing in the act except these words to indicate the intention of Congress; also because these words are being applied to a membership set-up and a method of charging for golf, substantially unchanged for 20 years before the passage of the first club dues tax in 1917.

"Dues" and "membership fees" are concededly synonymous. "Membership fees" mean "fees paid for membership."

Club dues in common understanding means the obligation the member assumes for his membership, the consideration for the membership, the obligation which recurs annually as long as the membership continues, regardless of how much or how little the member uses the club and its optional privileges, facilities, services or supplies.

The first reported case was *Weld v. Nichols*, in which dues or membership fees were defined as "definite obligations incidental to membership" and "applicable to all members of each particular class of membership," and the semi-annual golf fee was held not taxable. All the reported cases, except two involving the Merion Cricket Club are to the same effect.

The Treasury Department adopted this construction of the Act in 1926 when, shortly after the withdrawal of the Government's bill of exceptions in the *Weld* case, it deleted from the 1924 Regulations a statement that golf fees were dues. The Bureau followed this construction by making refunds, including one to the Merion Cricket Club. By the reënactment of the Act in 1928 with the same phraseology, Congress adopted this construction.

Until the Government's brief in *White v. Winchester* (to be argued immediately before the case at bar), neither the Treasury Department, nor the Bureau, nor the attorneys for the Government in any of the reported cases, have questioned the propriety of the definition laid down in the *Weld* case.

Of the three opinions of the court below Judge Jones' concurring opinion and Judge Maris' dissenting opinion both approved the *Weld* definition.

But Judge Jones, in applying the definition, disregarded the membership set-up fixed by the by-laws and held the golf fees to be dues because the playing of golf represented a large permanent investment, set apart and segregated as to upkeep and management—directly contrary to the *Weld* case and to the other reported cases.

We will not attempt to discuss Judge Clark's opinion in summary form, except to say that he disapproves of all

the reported cases and his definition of "dues or membership fees" is entirely novel.

## ARGUMENT

### ANNUAL FEES PAID BY MEMBERS TO A CLUB FOR THE PRIVILEGE OF PLAYING GOLF, OPTIONAL FOR THE MEMBERS AND TERMINABLE AT THE END OF THE YEAR, ARE NOT CLUB DUES.

Section 413 of the Revenue Act of 1928, quoted in full in the Appendix, imposes a tax of 10 per cent. on any amount paid to a club as "dues or membership fees."

This is an excise tax, one of the so-called luxury taxes. Of the numerous payments by members—for their membership, for various kinds of privileges or facilities to be enjoyed for long or short periods, or for services or supplies furnished, only one kind of payment has been selected by Congress for taxation—i. e., dues. There is nothing in the subject matter of payments by members to a club to indicate what kind of payments are most appropriate for taxation as luxuries. A tax on all such payments could be collected by the clubs as easily as those of one particular kind.

An excise tax having so narrow and specific a subject is plainly distinguishable from the income tax where Congress has intended to tax all the income of the taxpayer unless specifically exempt. In the case of the narrow excise, there is no guide to the scope of the tax except the literal meaning of the words used, whereas in the case of the income tax, the general purpose and spirit of the act furnish a background which compels an all-inclusive construction of its language (*Helvering v. Clifford*, 309 U. S. 331).

The membership set-up of the Merion Cricket Club as shown by its by-laws has been substantially the same since 1892 (R., 34). It acquired its first golf course in 1896, and since then has furnished golf privileges for its members by the payment of an optional fee in the same manner as is now done (R. 31, 32). This was twenty years before the tax on club dues was first imposed in 1917. (Revenue Act of 1917, 40 Stat. 300, Sec. 701.)

In the Appendix we will analyze the by-laws to show how unequivocally they distinguish the dues from the golf fees, and the privileges which the members of each particular class of membership obtained by the payment of dues, from the golf privileges obtained by the payment of the golf fees.

In 1917 when the dues tax was first imposed, there were doubtless many other clubs with membership set-ups and optional annual golf fees like Merion's, and the meaning of club dues must be construed with regard to such preëxisting arrangements.

This is exactly the reverse of so many cases which we see in the reports, where it is evident that the taxpayer's set-up of his personal finances has been made to fit in with the technicalities of some exemption. It is such cases that have led the courts to give such broad construction to tax statutes. The reasons for departing from the old rule that a taxing act will be strictly construed, entirely fail when the Court is construing an excise tax as applied to a financial set-up which existed twenty years before the tax was thought of.

The tax is imposed on "dues or membership fees." We understand that the Government concedes that these are synonymous. In the opinion in *Foran v. McLaughlin*, 59 F.(2d) 158, 160 (infra), it is stated:

> "Counsel agree that the terms 'dues' and 'membership fees', as used in the statute, are 'synonymous' and 'convertible'."

"Dues" is the significant word but "membership fees" has the same meaning.

A membership fee is a fee paid for membership. The word "fee" is often used after a noun to indicate the amount paid for it. An admission fee means the amount paid for admission. A license fee is the amount paid for a license. In the same manner we say tuition fee, passport fee, registration fee, examination fee, etc.

So we say a golf fee, or a skating fee, or a locker fee.

This is a very usual way of using the word "fee." A membership fee means the consideration paid for membership. This is precisely what we contend is the meaning of "club dues."

The commonly accepted meaning of "club dues" seems clear. When a man considers joining a club the first question he asks is: "What are the dues?" He knows that the dues represent the minimum that the club will cost him. He knows that if he is flush and likes the club, he will spend additional money on the various special privileges, facilities, services and supplies furnished by the club; but he also knows that if he gets hard-up, he can cut down on these expenses or entirely stop them, and still remain a member.

If he wants to know just what privileges he will enjoy without any payment beyond the dues, he examines the by-laws and ascertains the privileges of the class of membership which he considers joining. He knows that by joining the club he assumes an obligation to continue to pay the dues as long as his membership lasts—an obligation that recurs from year to year until he resigns, is expelled or dies.

If he is considering joining the Merion Cricket Club and wants the ladies of his family to have the use of the club, he finds he must join the Family Membership Class for which he will pay $120 per year, and that if the ladies find that they have no use for the club, he cannot transfer to a less expensive class.

He has found that the $120 per year is the consideration he pays for his family membership, that the obligation to pay it is incidental to his membership and is applicable to all the members of the Family Class, and that the obligation recurs as long as his membership lasts.

If he is a golfer and over 21 years of age he finds that he can play golf at $110 per year and that he can play one year and not play the next and resume playing whenever he feels like it. The $110 obligation does not recur if he does not desire to play for another year. If he stops playing golf and paying $110 per year, it has no effect on his membership. The $110 is the consideration he pays for the right to play golf. The obligation is not incidental to his membership.

We confidently submit that these considerations lead directly to the distinction between the nature of the $120 paid for Family Membership in the Merion Cricket Club and the $110 paid for the golf privilege; and that the distinction arises out of a difference in substance and not mere form and is entirely independent of the fact that the $120 is *called* the "dues" and the $110 is *called* the "golf fee" in the Merion by-laws.

The golf fees of 6 other clubs have been held not to be club dues in the following cases under the same reasoning.

*Weld v. Nichols*, 9 F. (2d) 977, Mass. 1925).

This is the first reported case on the subject.

In this case a member of the Brookline Country Club sued to recover a tax on a semi-annual golf fee collected from him by the club and paid to the collector under Section 501 of the Revenue Act of 1924 (43 Stat. 321). The by-laws of the club provided for six classes of membership and for the qualifications and privileges and the amount of the dues for each class of membership. The "golf rules" of the club provided that for the privilege of playing golf members should pay $1 per round, or $7.50 semi-annually, payable April and September. It was stipulated that some members paid $1 per round, some paid for six months, some paid for a year, and a minority did not play golf at all. The Government argued that taxable club "dues" included any payment by a member to a club which covered the use of a privilege for any substantial "period of time"; and that, therefore, while a casual or occasional payment was not taxable, a fee for the enjoyment of any privilege or facility over a relatively longer period was taxable. This argument was flatly rejected by the court.

The opinion lays down two definitions of dues or membership fees:

1. "Definite obligations incidental to membership in the club"; and

2. "Fixed and definite charges applicable to all members of each particular class of membership."

In discussing the Treasury Regulations (Appendix, p. 36) and the practice of the department the Court said:

> "Moreover, the practice of the department is difficult to reconcile with the present contentions of the government, or with any definite principle of interpretation of this section. The department does not tax charges for

golf by the day, nor for rooms by the week, or board by the week."

*Foran v. McLaughlin*, 59 F. (2d) 158, cert. den. 287 U. S. 637 (C. C. A. 9th, 1932).

This case dealt with the monthly fees paid by members of the Olympic Club of San Francisco who held "Contributing A Member" privileges to play golf. These privileges were not governed by the by-laws and the evidence consisted of circulars, resolutions of the board and the golf committee and oral testimony by the president of the club. It appeared that in order to finance the construction of a new golf course, the board issued a circular stating "it is planned to create a class to be known as 'Contributing Members' ". A payment of $275, afterwards increased to $1000, entitled the member to a class A or a class B privilege at his option. The class A privilege required the member to pay a monthly fee of $4, the fee involved in the case. A class B privilege entitled the member to play by paying daily green fees.

The by-laws provided that members were elected by the Board and the evidence contains a number of extracts from the minutes of the Golf Committee recommending golf players to the Board for election. One of the usual forms of the minutes was that the Committee "recommends that the following be elected to Class A Contributing membership in the Olympic Club. . . ."

It was held that the $4 fees were taxable as dues. The court, in distinguishing *Weld v. Nichols*, supra, stated:

> "That case involved an 'additional fee' of $7.50 for the privilege of playing golf for six months, on which fee a tax of 75 cents was assessed. The report of

the case does not disclose whether the club member holding the golf privilege was or was not compelled to pay the 'additional fee' for another six months at the close of the first six-month period. It is not shown whether the member would have been absolved from paying the six-month fee in case he had decided he did not desire to play golf during the ensuing semester. In other words, the printed record of the Weld case, supra, is silent as to whether or not the member's obligation to pay the fee was a fixed and *recurring* one, and one that carried with it contractual liability. As will be seen presently, the appellant's obligation was of this latter kind."

The opinion then shows by specific instances from the minutes that the liability to pay $4 per month was not terminable at the option of the club member. While some of the minutes indicated that a member might have been granted a release if he had paid for "at least" twelve consecutive months, the court assumed that this was a matter of grace which could be withheld by the club and that liability recurred into the future over an "indefinite period of time." The court's opinion concludes (p. 161):

"The foregoing excerpts from the minutes clearly indicate that, by whatever name these Class 'A' memberships were called, they entailed upon their holders a fixed, contractual liability to pay monthly green fees, regardless of their desire to continue to use the greens. Assuredly, these so-called 'fees' were not for a single, casual and occasional privilege—like a chance meal at the country club dining room—but represented a *recurring, contractual* obligation, extending over an indefinite period of time, and, in the language of the Weld case, supra, 'incidental' to a 'particular class of membership.' We therefore believe that these 'fees' were properly taxed."

It will be seen that there was substantial evidence that the club itself intended these "Class A Members" to constitute a class of membership, a fact entirely absent in the *Weld* case (supra) and in the case at bar. But the Court considered the critical fact to be that the obligation to pay the monthly fee could not be terminated but was an indefinitely recurring one. And the Court approved the *Weld* case on the assumption that Weld could have terminated his liability if "he had decided he did not desire to play golf during the ensuing semester."

In every subsequent case the Government approved the *Weld* definition but used the instant case to sustain its argument that those members who paid the golf fee constituted "a particular class of membership."

This argument required the overruling of the *Weld* case and is directly contrary to the reasoning of the instant case. It was rejected in the following cases.

*Baltimore Country Club v. U. S.*, 7 F. Supp. 607 (Md. 1934). This was another case of an annual golf fee. The opinion quotes the *Weld* definition and states that the golf fees

> "are not taxable, because they are not based upon membership. They are not assessed upon any group or class of members because of membership."

*Williamson v. U. S.*, 12 F. Supp. 26 (Western North Carolina, 1934). This case involved the semi-annual golf fees of the Charlotte Country Club. The court cited with approval both the *Weld* definitions, distinguished these golf fees from dues on the ground that the latter "must be paid in order to retain membership in the club" and decided that the golf fees were not taxable.

*Philadelphia Cricket v. United States*, 30 F. Supp. 141 (Eastern Pa. 1939). This case held that the annual golf fees were not club dues.

*White v. Winchester Country Club*, 117 F.(2d) 146. This is the case now pending before this Court on certiorari. This case approves both the *Weld* definitions.

These six cases are all the reported cases except the case at bar and *Hardt v. McLaughlin*, which also involved the Merion golf fees and which we will discuss later.

THE VARIOUS MEANINGS WHICH HAVE BEEN GIVEN TO THE WORDS "DUES OR MEMBERSHIP FEES" BY THE TREASURY DEPARTMENT AND THE BUREAU OF INTERNAL REVENUE.

1. In 1925, when the *Weld* case was decided, the Treasury Regulations, revised September 1924, Article 9, pp. 10 and 11 (Appendix, p. 36), contained the following:

> "So, also [subject to the tax] are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

and among the examples:

> "(7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured by the member's family. A payment of this extra $10 is taxable as a membership fee."

We believe that the only charges for the privilege of using additional facilities, on which the Government ever

attempted to collect the dues tax, were golf fees. With the Merion Cricket Club, the testimony shows (R. 35, 36) the following charges on which the tax was never collected:

> "Locker-room five dollars a year; use of skating pond, five dollars a year; care of a sedan car in the garage, $22.50 per month; sleeping room in the clubhouse, $55. a month."

The opinion in the *Weld* case refers to the fact that "The department does not tax charges for golf by the day, nor for rooms for the week, or board by the week." This was one of the reasons why the Court did not consider itself bound by the Regulations we have just quoted. If the Government did not follow its own regulations, the courts were under no obligation to do so.

2. On May 21, 1926, two months after the Government withdrew its Bill of Exceptions in the case of *Weld v. Nichols* (discussed supra), a new revision of the Treasury Regulations (Appendix, p. 36) was promulgated, in which the above quoted paragraphs were deleted. If the Government intended to accept the construction laid down by the *Weld* definitions and make refunds to other clubs, this action was necessary, as the existing Regulations were in direct conflict therewith.

This deletion was an unequivocal announcement that the Treasury Department construed "dues or membership fees" not to include extra charges for the privilege of using additional facilities, or annual golf fees, or extra fees for the privilege for the member's family to skate on the club's rink.

The adoption of this construction was followed by the making of refunds when the facts were similar to those in the *Weld* case (R. 20, 21). These refunds included one to

the Merion Cricket Club made on March 13, 1928, because the claim "represents taxes on extra charges collected from members for the privilege of using the golf course" (R. 33). These words of the Deputy Commissioner are almost identical with the wording of the deleted portion of the previous Regulations.

On May 29, 1928, the Revenue Act of 1928 (the Act here involved) was approved (Appendix, p. 35), using the same words as those in the Revenue Act of 1924 which was the Act construed in the *Weld* case.

By the reenactment of the Act of 1924 in the same words, Congress adopted the construction, which had been placed upon these words by the Treasury Department (i. e., that they did not include an annual golf fee) and which had been followed by the Bureau in administering the Act.

The leading case on this principle is *United States v. G. Falk & Brother*, 204 U. S. 143 (1907). Falk imported tobacco after the date of the passage of the 1897 Tariff Act and stored it in a bonded warehouse. When he withdrew the tobacco it had lost considerable weight by the evaporation of moisture. The Collector assessed the duty upon the weight of the tobacco at the time of *entry;* Falk contending that it should be assessed upon the weight at the time of *withdrawal.*

The Board of General Appraisers and the Circuit Court affirmed the action of the Collector. The Circuit Court of Appeals for the Second Circuit reversed the decision. The Government appealed to the Supreme Court, which reversed the decision of the Court of Appeals, holding that the duty was properly assessed on the weight at the time of *entry.*

The Customs Administrative Act of 1890, as amended by the Act of 1902, provided that the same rate of duty

should be collected on goods removed from a bonded warehouse as if the goods had been imported at the time of their withdrawal and the Circuit Court of Appeals held that this act was controlling and that the duty on Falk's tobacco should have been assessed on its weight at the time of withdrawal.

The Government contended that Section 33 of the Tariff Act of 1897 changed this rule and imposed the duty on the weight at the time of *entry*. This Section, so far as material, is as follows:

> "That on and after the day when this Act shall go into effect all goods . . . previously entered without payment of duty and under bond, . . . shall be subjected to the duties imposed by this Act . . . upon . . . the withdrawal thereof; Provided that when the duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

It will be seen that the main provision of this Section of the Act of 1897 applies *only* to goods entered *before* the passage of the Act and could have no application to Falk's tobacco which was entered after its passage. The general rule is that a proviso applies only to the subject matter of the section to which it is appended; and Falk contended that the proviso had no application to his merchandise and that the duty should have been levied on the weight at time of withdrawal in accordance with the Customs Administrations Act of 1890.

The Government contended that the proviso was general and applied to all goods whether imported before or after the enactment of the Tariff Act of 1897.

It appeared that Section 50 of the Act of 1890, which

preceded the Act of 1897, was substantially the same as Section 33 of the Act of 1897. The first part of Section 50 of the Act of 1890 applied to merchandise imported before the effective date of that Act and the proviso was precisely the same as the proviso in the Act of 1897, except that the last word of the proviso in the Act of 1897 was "withdrawal", instead of "entry" as in the Act of 1890. The Attorney General had rendered an opinion upon the Act of 1890 in which he held that the proviso assessing duties upon the weight of the merchandise at the time of its withdrawal was of general application and applied not only to merchandise imported *before* the effective date of the Act but also to merchandise imported *after* the effective date of the Act. The executive officers of the Government followed this construction until the passage of the Act of 1897.

Mr. Justice McKenna in delivering the opinion of the Court said (page 149):

> "The construction made by the Attorney General is disputed, as applicable to section 33 of the act of 1897, and it is urged that the whole scope and meaning of that section, when reduced to its simplest terms, make goods theretofore entered under bond for warehouse subject to the duties imposed by the act upon the withdrawal thereof, when the section is construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. This may be conceded to be the primary purpose of a proviso, but a presumption of such purpose can not prevail to determine the intention of the legislature against other tests of meaning more demonstrative. We said in *United States v. Whitridge*, 197 U. S. 135 (p. 143): 'While no doubt the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed.' And the Attorney General's opinion

> can not be overlooked. The proviso which he construed in section 50 of the act of 1890 was reënacted in section 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed."

And he concluded the opinion as follows (page 152):

> "This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse."

It will be seen that in the case at bar we have the three conditions which this case considered necessary to show that Congress has adopted the construction for which we are contending.

1. The Treasury Department's construction of the meaning of "dues or membership fees" in the Act of 1924, that these words did not include extra charges for additional privileges such as $60 per annum for the privilege of using the golf links, by the deletions in promulgating the Regulations of May 21, 1926.

2. The refunds allowed where the facts were similar to the *Weid* case, including the refund to the Merion Cricket Club.

The *Falk* case has been cited by this Court with approval many times and the principle enunciated has never been modified or questioned.

In *U. S. v. Hermanos*, 209 U. S. 337 (1908), opinion concluded as follows (p. 339):

> "And we have decided that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."

In *National Lead Co. v. U. S.*, 252 U. S. 140, the Court said (p. 146):

> "the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed."

In *U. S. v. Dakota-Montana Oil Co.*, 288 U. S. 459 (1933), the Court said (p. 466):

> "The administrative construction must be deemed to have received legislative approval by the re-enactment of the statutory provision, without material change."

In *Helvering v. Winmill*, 305 U. S. 79 (1938) this Court said, in an opinion by Mr. Justice Black (p. 83):

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law."

It is hard to understand the Government's reference, in its brief in the case of *White v. Winchester Country Club*, No. 63 of October Term, 1941, to the deleted portions of the Regulations of September, 1924. On pp. 10 and 11 the dele-

tions are quoted and are immediately followed by this statement:

> "Against the background of these regulations, the Revenue Act of 1926 was adopted and subsequently enlarged in 1928. A construction of the statute in harmony with the pre-existing regulations is therefore justified."

The Revenue Act of 1928 was *not* adopted against the background of these provisions of the 1924 Regulations, because they were deleted from the Regulations in 1926, two years before the Act of 1928 was adopted.

As to the Revenue Act of 1926, approved February 26, 1926, we are not interested in taxes on golf fees paid between its date and May 21, 1926, when the new Regulations were approved. And the testimony shows (R. 33) that the Bureau refunded to the Merion Cricket Club the taxes on the golf fees collected up to May 18, 1926, and continued making refunds of the taxes on similar golf fees until the case of *Foran v. McLaughlin*, 59 F. (2d) 158 (discussed supra), was decided (R. 21).

The Government certainly does not contend that *Helvering v. Winmill* (supra), requires a statute to be construed "in harmony with pre-existing regulations" which were repealed two years before the statute was adopted.

The Revenue Act of 1926 is significant because it was passed by Congress and was approved by the President, between December 30, 1925, when the judgment was entered in the *Weld* case, and March 23, 1926, when the Government withdrew its bill of exceptions. The experts of the Bureau of Internal Revenue were surely engaged contemporaneously in advising the Commissioner whether "dues or membership fees" included annual golf fees, and in advising the

Committees of Congress as to the phraseology of the new Revenue Act.

3. The third change in the Government's treatment of dues or membership fees occurred when they ceased to make refunds in cases similar to the *Weld* case. This followed the decision in *Foran v. McLaughlin* (R. 21). We have shown that, following that case, the Government consistently approved the *Weld* definitions but argued (unsuccessfully except in the two Merion cases) that the members who paid golf fees constituted "a particular class of members."

The decisions of the Bureau have also approved the two *Weld* definitions.

Internal Revenue Bulletin Vol. IX, No. 2, contains at p. 414 an opinion of General Counsel of the Bureau discussing dues and membership fees, which was prepared January 14, 1930 (R. 21). The opinion refers to the *Weld* case and quotes the two definitions with approval: "definite obligations incidental to membership in the club" and "fixed and definite charges applicable to all members of each particular class of members."

On September 27, 1930, the Deputy Commissioner in a letter to the Collector in Philadelphia (R. 22) informed the Merion Cricket Club that the previous ruling that its golf fees were not club dues (the ruling when the refund was made) had been reversed. On May 4, 1931, the Deputy Commissioner wrote to Bromley, Evans & Staples (R. 24), counsel for the club, that our protest against the letter of September 27, 1930, had been referred to General Counsel for a specific ruling. The letter again approves the two definitions from the *Weld* case.

On August 26, 1931, the Commission wrote to Frank M. Hardt (plaintiff in the case of *Hardt v. McLaughlin*,

discussed infra) (R. 26) rejecting his claim of refund. This letter again cites the *Weld* case and quotes with approval the two definitions.

In none of the briefs filed in the reported cases (and we believe we have read all of them) have the Government's attorneys questioned or attacked the *Weld* definitions.

We can assert without fear of contradiction that from May 21, 1926, when the deletions were made from the Treasury Regulations, until the filing of the Government's brief in *White v. Winchester*, No. 63 of October Term, 1941, the various executives of the Government administering the Revenue Acts have approved the definition of dues and membership fees given by the *Weld* case.

And although the Government has been resisting the paying of refunds for more than 11 years, by arguing that annual golf fees, optional for the members and terminable at the end of the year, were club dues, the Regulations have remained the same, and the Treasury Department has never changed its authoritative and unequivocal declaration that "dues or membership fees" did *not* include "extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links."

4. The latest change in the Government's handling of dues or membership fees was brought about by its brief in *White v. Winchester Country Club* now before this Court.

The only authority for the new theory is the opinion of Judge Clark in the case at bar (discussed infra).

As the reason for presenting a new definition after 15 years, the Brief states (p. 11):

> "An examination of the cited cases fails to reveal substantial consistency among the courts with respect to the meaning to be given to the term 'dues or membership fees.' "

This we deny. *All* the courts and *all* the individual judges, except Judge Clark, and also the Bureau have agreed that the words mean "definite obligations incidental to membership" or "fixed and definite charges applicable to all members of each particular class of membership." (Two out of the three judges of the Circuit Court of Appeals for the Third Circuit agreed to this definition.)

In the case of six of the seven clubs involved in the reported cases, it was held those members who paid a periodical golf fee, optional for the members and terminable at the end of the period, did not constitute a "particular class of members."

Judge Kirkpatrick agreed to this in 1939 in one case (*Philadelphia Cricket Club v. United States*, supra), although, several years before, he had disagreed with it in *Hardt v. McLaughlin* (infra).

In the Court below in the case at bar, one judge agreed and one disagreed and Judge Clark thought all the cases lacked logic.

Before discussing the three opinions in the Court below we would refer to *Hardt v. McLaughlin*, 25 F. Supp. 684 (Eastern Pa., 1936). This case also involved the golf fees of the Merion Cricket Club and the case at bar was tried on the testimony of this case.

Judge Kirkpatrick decided that the golf fees of the Merion Cricket Club were taxable. No appeal was taken from the judgment. Judge Kirkpatrick said that the golf fees carried

> "the privilege of using substantial portions of the club property, often representing a large permanent investment and rather definitely set apart and segregated as to upkeep and management."

He quoted with approval the definition of the *Weld* case "fixed and definite charges applicable to all members of each particular class of membership." The opinion then continues:

> "In the case at hand it is true that the by-laws divide the Merion Club membership into nine classes, and that golf-playing members are not mentioned in the classification as distinct from any other class, but I cannot see any reason why members who have acquired the right to play golf on the club links—a right which club members do not have by virtue of their membership—by paying a regular additional annual assessment are not just as much a class of members as those, say, who by paying more than the minimum regular dues get the right to have admission cards issued to the ladies of their immediate families which entitle the ladies to all the privileges of the grounds and the main club house ('family members' in the classification made by the by-laws)."

In short, the case decides that those members who pay the golf fee constitute a "particular class of membership." The above quotations from the opinion are just as applicable to golf fees in the *Weld* case as to the golf fees of the Merion Cricket Club. They are also applicable to the golf fees of the Philadelphia Cricket Club, which Judge Kirkpatrick later held were not taxable. (*Philadelphia Cricket Club v. U. S.*, 30 F. Supp. 141, supra.)

THE THREE OPINIONS IN THE COURT BELOW

Judge Maris' dissenting opinion is a clear statement of both the meaning of dues or membership fees and the application of the definition to the facts in the case at bar.

Judge Jones' concurring opinion adopts the opinion in *Hardt v. McLaughlin* thus approving its definition (originating in the *Weld* case) "fixed and definite charges applicable to all members of each particular class of membership." This definition therefore has the sanction of the majority in the Court below. This makes the courts which have considered this matter unanimous on this definition. And the judges are unanimous except for Judge Clark.

Judge Jones and Judge Maris differ on only one point. Judge Maris reasons that the members who constitute a "particular class of membership" should be determined from the membership set-up as shown by the by-laws. Judge Jones reasons it must be determined aliunde the by-laws, by the character of the privilege or facility for which the questioned payment is the consideration.

Judge Jones' opinion (and this applies equally to the opinion of Judge Clark) entirely disregards the fact that the words "dues or membership fees" appear in two other portions of the section, and must be given the same meaning each time they are used.

Section 501 (a) (1) provides that the dues or membership fees paid to a club are taxable only "if the dues or fees of an active resident annual member are in excess of $25 a year." Section 501 (c) provides: "In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assess-

ments, but shall pay no tax upon the amount paid for life membership."

Let us suppose the case of a more modest club whose by-laws provide for three classes of membership—Junior Membership $5 per year, Senior Membership $20 per year and Life Membership. The club gives its members the option of additional privileges or facilities such as playing tennis, skating, use of locker room, etc., at $2 per year each.

If the dues or membership fees of a Senior Member include not only the $20 but the special privilege fees he happens to pay (which is Judge Jones' decision), how would the club know at the beginning of the year when the dues are payable, whether or not to collect the tax on any of the dues, and how much to collect from the Life Members? And a Life Member who did not want any of the special privileges would have to pay the tax on all of them, if any Senior Member happened to use all the privileges.

This portion of our argument is not fanciful. It constituted one of the reasons why Judge Morton in the *Weld* case decided that golf fees were not taxable. And it is referred to in several of the other reported cases as material on the question.

The Government in its brief in *White v. Winchester C. C.* fails to find "substantial consistency among the courts with respect to the meaning to be given to the term 'dues or membership fees'" and states that the distinctions laid down by the courts are unreal. It is respectfully submitted that once we accept the *Weld* definitions and their application to a normal membership set-up such as is usually established by the by-laws, there is no inconsistency in the cases. It is only when we try to apply the statute without regard to the membership set-up as established by the by-laws that we find difficulty.

In regard to Judge Clark's opinion we confess that we are by no means sure as to its meaning. But we will first refer to his treatment of the two fundamental features of a case like this—the wording of the statute and the facts to which the words must be applied.

The critical words of the statute are, of course, "dues or membership fees." These words are referred to twice in Judge Clark's opinion and each time are misquoted as "membership dues and fees." This may be an unconscious error. But if when Judge Clark wrote the opinion, he thought that those were the words used by Congress and if he thought that the word "membership" modified dues and not fees (which we believe would have been correct), then Judge Clark's entire disregard of the membership set-up of the club is understandable, and his opinion much clearer.

There are only two references in the opinion to the *facts* of the case, and in each instance the facts are misunderstood.

1. The opinion commences by reference to two other attempts by clubs to escape the tax, and then states that the case at bar is one of a series arising out of the third move and that in furtherance of this move "the general dues are still lowered but the resulting deficit is met by the creation of a 'playing' membership." Of all the reported cases, we believe that Merion is the only club having a Playing Membership, and this must refer to us. Merion has had a Playing Membership since 1892. Playing Members are entitled to the athletic facilities of the Main Grounds but not to the use of the Main Club House or the Golf House (R. 12). They are not permitted to play golf at all (R. 15). The facts are therefore directly opposite from Judge Clark's understanding. And if the club *had* created a "playing

membership" to consist of those members who desired to play golf, then the annual payment for that membership would have been dues without question.

2. Merion permitted certain members not enjoying the annual golf privilege, to play under limited condition on payment of daily green fees which the Government never taxed (R. 19, 36).

A number of the reported opinions have stated that the Government was inconsistent in claiming the tax on golf fees for the privilege of playing golf for a month, for 6 months or for a year, and not claiming it on green fees for the privilege of playing for a day. The opinion denies this inconsistency and states:

> "The green fee is not an attempt to charge the appropriate fraction of a general cost. It is an arbitrary amount billed to *non-members* for the privilege of playing." (Italics ours.)

Here again Judge Clark is in error on the facts because Merion has never permitted a non-member to play by paying a green fee.

Judge Clark seems to have misapprehended not only the facts but the law. Certainly no fee paid by a non-member to a club could be either dues or a membership fee. (See the last paragraph of the Deputy Commissioner's letter of May 4, 1931 (R. 25)).

Perhaps Judge Clark thought the act read "membership dues and fees", in which case a fee paid by a non-member would have been taxable.

Judge Clark's understanding of the meaning of club dues seems to be as follows: From the derivation of the word "club" he concludes that "the theory is one of joint

expenditure." Some clubs carry this theory to its logical conclusion and divide the entire cost of running the club equally among the members as dues. But most clubs do not go to such lengths, but "apportion to the particular recipients [the cost of] certain supplies and services." The remaining cost of running the club comes from the members as "initiation fees" and "dues".

So far it is clear. Any payment for supplies or services, the cost of which is "apportioned" to the particular recipients who enjoy them, is not dues—all other payments are dues.[1]

But when we fit into this, the idea of a difference between "single and individual" enjoyment and "common and repeated" enjoyment, the problem becomes complicated.

One man likes to play the golf course all by himself and his enjoyment comes out of the "single and individual" use of the links. Others prefer to play with friends and get their enjoyment out of the "common use" of the links. And whatever enjoyment the golf player gets out of the golf facilities it seems to us to be the same whether he pays $5 per day or $110 per year.

And when we come to the "apportionment" of the cost the matter is still more confused. Apparently if the club apportions the cost to the particular recipient, the charge is not dues. If so, who will say that the charge for golf for a year is *not* an apportionment of the cost between the members paying the golf fees; and that the charge for golf for

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NOTE 1—This seems to us to be directly contrary to the Government's understanding of Judge Clark's opinion. In the Government's new definition (pp. 14 and 15 of its brief in *White v. Winchester Country Club*), a payment is not dues unless it "represents an apportionment of the cost of maintaining and operating that common facility."

a day *is* such an apportionment. We suppose that every club (and this is certainly true of Merion) in fixing the extra charges for facilities or privileges or services or supplies tries to be fair to those members who will use them and to those who won't. And this is just as true of the cost of a table d'hote dinner as of the golf fee.

Referring again to Section 501 (a) (1) and to our example of the club whose charge for Senior Membership was $20, we would be glad to know what meaning Judge Clark would give to the words "dues or fees of an active resident annual member", and whether the derivation of the meaning of the word "club" would enable him to give any meaning to those words without looking at the club's by-laws.

We doubt if many of the members of Congress who adopted the Act of 1928, or of the men who drafted the Merion by-laws in 1892 were as erudite as Judge Clark. But certainly most of them knew the difference between their club dues and their golf fees; and that their dues were the consideration they paid for membership and for those rights given by the by-laws to the particular class of membership to which they were elected; and that their golf fee was optional and terminable like any other additional charge.

It is respectfully submitted that the golf fees were not taxable and that the judgment should be reversed.

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# APPENDIX

## THE REVENUE ACT OF 1928

Section 413 of the Act approved May 29, 1928, Ch. 852, 45 Stat. at Large 864 (see 26 U. S. C. A. (1940) §1710, Internal Revenue Code §1710, 53 Stat. Part 1, p. 192), is as follows:

"Club dues tax.—(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or

membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

## TREASURY REGULATIONS 43 (1928 Rev.)

"ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, that the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an 'active resident annual member' of such club are in excess of $25 per year. 'An active resident annual member' is a member who is neither a life nor a non-resident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associate or other partial membership.

"The term 'dues' is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

"Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

"Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore not taxable."

The fourth paragraph is derived from Article 9 of Regulations 43 Revised May 16, 1926, which was approved shortly after the decision of *Weld v. Nichols*. This 1926 Revision deleted from the Revision of September 1924 certain portions inconsistent with the *Weld* decision. In the following quotation from the 1924 Revision we have italicized the portions deleted by the Revision of 1926:

"Art. 9. Dues or membership fees.

. . . . . .

"Where the dues or membership fees, determined in the manner herein outlined, of an active resident annual member are in excess of $10 per year, dues or

membership fees paid by other classes of members, whether or not they are in excess of $10 per year, are subject to the tax. *So, also are extra charges which are imposed upon members for the privileges of using certain additional facilities for a period of time, as for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links.* A 'greens fee' charged to a guest is not taxable, unless the right or privilege granted in return is for a period of time, such as a season. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the Act, and therefore not taxable."

Examples:

*"Example 7. The members of a certain curling club pay annual dues of $20. By the payment of $10. extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee."*

## ANALYSIS OF BY-LAWS

Art. I, Sec. 1 commences (R. 10):

"There shall be the following Classes of Members".

This is followed by sub-paragraphs each providing for one of the ten classes of membership. The qualifications and privileges of the members of each class are set forth in detail. The introductory clause—"There shall be the following Classes of Members" originated in the by-laws of 1892, at which time there were seven out of the present ten classes (R. 34). Since that time there have been only minor changes

in the classes of members, except that the life membership is being abolished.

The phrases "classes of members" and "classes of membership" are used eight times in the by-laws (R. 10, 10, 11, 12, 13, 14, 15, 18). They are never used with an unnatural or forced meaning. Every time they are used, the context shows that they refer only to the classes into which the membership is divided by Art. I, Sec. 1, and that they could not refer to the members who are enjoying golf privileges or any other special privilege for which the member pays an additional periodical fee and which he can exercise and terminate at will.

The words "golf privileges", "golf facilities", and "privilege of playing golf" are used nine times in the by-laws (R. 14, 15, 15, 15, 15, 16, 17, 17, 17). They are used in their natural meaning and it is clear that the exercise of the golf privilege has no relation to the class of membership to which the member belongs.

The words "privileges of the club" and "privileges" of a specified class of membership are used eleven times in the by-laws (R. 10, 10, 11, 11, 12, 12, 12, 13, 14, 14, 14). Every time they are used, the context shows that they refer to the privileges which are "incidental to membership", *i. e.*, the privileges to which the member is entitled without the payment of any amount except his dues; and that they do not include the privileges of playing golf nor any other special privilege for which an additional charge must be paid.

The words "dues" and "golf fees" are used many times. There is no possibility of confusing the two. There is nothing in the by-laws to indicate that the essential characteristics of the two forms of member obligation are similar.

The evidence shows that for 20 years proprietary mem-

bers have paid the "golf fee" in spite of the provision in the by-laws and in the lease of the main grounds (R. 30 to 32) that as stockholders of the Haverford Land and Improvement Company they are "entitled to all the privileges of the Club, without the payment of entrance fee, annual dues or assessments".

"Resignations" of membership must be presented in writing to the Secretary (R. 16); notice of "withdrawal" from exercise of golf privileges must be given to the Treasurer (R. 15).

The by-laws require the treasurer to send to every member, upon receipt of his dues, "a card of admission, upon which shall be printed the privileges of the class of membership to which he belongs" (R. 17, 18). The cards of admission do not state whether or not the member is exercising the golf privilege (R. 36, 37).

The inception of the obligation to pay dues is by election by the committee on membership under detailed requirements (R. 15, 16). The inception of the obligation to pay the golf fee is not specially provided for by the by-laws. A printed form of application is provided (R. 18), but the practice is that no formal application is required, nor any approval by board, committee, or officer (R. 35).

The by-laws permit a member, under specified conditions, to transfer from certain classes of membership to certain other classes. But no transfer is permitted where the member's dues will be decreased, except when he is elected by the club to honorary membership, or becomes entitled to proprietary membership by the purchase of Haverford Land and Improvement stock under the provision of the lease of the main grounds (R. 10, 14). Liability for the golf fee can be terminated at will.

The golf fees have so little relationship with the dues and the classes of membership, that Art. II, Sec. 2, 1-a (R. 17) which fixes the amounts of the golf fees uses the word "Juniors" to mean boys under 21 years of age, while "Junior Membership" is for boys under 16 (R. 13).